

FILED
DEC 29 2015
CLERK
SUPREME COURT

SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000371-TG

Handled
RECEIVED
DEC - 9 2015
SUPREME COURT

KENTUCKY RESTAURANT
ASSOCIATION, INC., KENTUCKY
RETAIL FEDERATION, INC., and
PACKAGING UNLIMITED, LLC

APPELLANTS

v. ON APPEAL FROM JEFFERSON CIRCUIT COURT
JUDITH McDONALD-BURKMAN, JUDGE
CASE NO. 15-CI-000754

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT

APPELLEE

BRIEF OF *AMICUS CURIAE*, KENTUCKY GROCERS ASSOCIATION/KENTUCKY
ASSOCIATION OF CONVENIENCE STORES

John C. Roach
RANDELL & ROACH, PLLC
176 Pasadena Drive, Building One
Lexington, Kentucky 40503
(859) 276-6262
COUNSEL FOR *AMICUS CURIAE*, KENTUCKY
GROCERS ASSOCIATION/ KENTUCKY
ASSOCIATION OF CONVENIENCE STORES

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this **Brief of *Amicus Curiae*** were served by first class U.S. mail, postage prepaid, this 9th day of December, 2015 upon the following: Brent R. Baughman and Aleksandr "Sasha" Litvinov, Bingham Greenebaum Doll LLP, 3500 National City Tower, Louisville, Kentucky 40202; Michael J. O'Connell, E. Patrick Mulvinill, David A. Sexton and Sarah J. Martin, Jefferson County Attorney, 531 Court Place - Suite 900, Louisville, KY 40202; Clerk of Jefferson Circuit Court, Louis D. Brandeis Hall of Justice, 600 W. Jefferson Street, Louisville, Kentucky 40202; Honorable Judith McDonald-Burkman, 700 W.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES	i
PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED	1
INTRODUCTION	1
ARGUMENT	2
Richard A. Posner, <i>Economic Analysis of the Law</i> § 11.7 (6th ed. 2003)	2
Brian Strow, The Bluegrass Institute, <i>The Minimum Wage and its Effect on Kentucky's Economy</i> (2015)	2
Mark Wilson, <i>The Negative Effects of Minimum Wage Laws</i> , 701 Policy Analysis (June 21, 2012).....	2
I. Kentucky has adopted a statewide comprehensive scheme of legislation on the minimum wage.	3
KRS 337.275	3-4
KRS 337.285-.405	4
803 KAR 1:005, <i>et seq.</i>	4
<i>Ky. Licensed Beverage Ass'n v. Louisville-Jefferson County Metro. Gov.</i> , 127 S.W.3d 647 (Ky. 2004)	4
II. Local increases in the minimum wage have the effect of balkanizing the economy and restricting the free flow of commerce.	5
<i>Ky. Milk Marketing & Antimonopoly Comm'n v. Kroger Co.</i> , 691 S.W.2d 893, 900 (Ky. 1985)	5
<i>Motor Vehicle Comm'n v. Hertz Corp.</i> , 767 S.W.2d 1, 3 (Ky. App. 1989)	5
<i>New Orleans Campaign For a Living Wage v. City of New Orleans</i> , 825 So. 2d 1098 (La. 2002)	7-8
Debra Burke, Stephen Miller, & Joseph Long, <i>Minimum Wage & Unemployment Rates: A Study of Contiguous Counties</i> , 46 Gonz. L. Rev. 661 (2011)	8-9
907 KAR 1:025	9
III. Kentucky's urban/rural divide amplifies the negative consequences of a local minimum wage increase in Louisville.	9
National Federation of Independent Business, <i>How to Fight Local Balkanization of Labor & Employment Standards</i> (July 31, 2015), available at http://www.nfib.com/article/how-to-fight-local-balkanization-of-labor-and-employment-standards-70289/	10-11

IV. The Appellees rely heavily on federal and out-of-state authorities, but those authorities do not address Kentucky’s statewide comprehensive scheme of legislation, nor do they address the deleterious balkanizing effect that local control would have on such a scheme.	11
<i>Int’l Franchise Ass’n v. City of Seattle</i> , 97 F.Supp.3d 1256 (W.D. Wash. 2015)	11-12
<i>RUI One Corp. v. City of Berkeley</i> , 371 F.3d 1137, 1150 (9th Cir. 2004)	12-13
RCW 49.46.120	13
KRS 337.395	12
KRS 344.300	13
<i>New Mexicans for Free Enterprise v. City of Santa Fe</i> , 138 N.M. 785, 125 P.3d 1149, 1156 (N.M. App. 2005)	13-14
<i>City of Baltimore v. Sitnick</i> , 254 Md. 303, 255 A.2d 376 (Md. 1969)	14
<i>Ky. Licensed Beverage Ass’n v. Louisville-Jefferson County Metro. Gov.</i> , 127 S.W.3d 647 (Ky. 2004)	14-15
<i>Wholesale Laundry Bd. of Trade, Inc. v. City of New York</i> , 17 A.D.2d 327, 234 N.Y.S.2d 862, 864-65 (App. Div. 1962)	15
<i>Wholesale Laundry Bd. of Trade, Inc. v. City of New York</i> , 43 Misc.2d 816, 252 N.Y.S.2d 502, 506 (N.Y. Sup. 1964)	15
CONCLUSION	15

PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

The purpose of this brief is to assist the Court in considering the primary issue in this case: whether Louisville's minimum wage ordinance is a valid exercise of its home rule powers, or whether the ordinance impermissibly intrudes into a field in which the Commonwealth has established a comprehensive scheme of legislation. Through this brief, the Kentucky Grocers Association/Kentucky Association of Convenience Stores ("KGA") desires to assist the Court in understanding the disruptive, balkanizing effects that local minimum wages will have on Kentucky's economy, and why it is important to preserve the existing statewide comprehensive legislative scheme on the minimum wage.

INTRODUCTION

The KGA is a group of food and fuel retailers, wholesalers, and supplier companies working together for the common interest of the grocery, supermarket, and convenience store industries. Kentucky grocers and convenience store retailers operating across the state offer part-time after school, weekend, and summer employment to teenagers and young adults across Kentucky. These entry-level jobs offer employees the opportunity to learn useful business skills such as customer service, teamwork, and the fundamentals of the retail industry. The KGA has petitioned the Court to file this brief in order to give voice to the interests of its members and its entry-level employees, who form a vital part of Kentucky's economy. The KGA and its members support the arguments presented by the Appellants.

The issue raised in this case is of great import not only to Kentucky's grocers, but to virtually everyone who has a stake in the health and well-being of Kentucky's economy. The question here is whether Kentucky municipalities will be allowed to set their own minimum wage rates. This question should be answered with a resounding

“no.” To allow municipalities to set minimum wage rates higher than the rate set by the General Assembly would cause significant increases in the cost of labor for KGA’s member businesses, and it would likely cause many of the employees who depend on their minimum wage jobs to lose those jobs. But this brief will not focus on these oft-decried negative consequences of minimum wage increases. Instead, this brief will focus on one of the more subtle and less discussed—but still powerful—negative consequences of locally mandated minimum wages: the balkanization of the Commonwealth’s economy.

Locally mandated minimum wages damage the cohesiveness of Kentucky’s economy. Among other things, they disrupt the free flow of commerce by allowing cities to erect barriers to entry, and they cause uncertainty and costs that stifle economic growth. They also lead to inflation that harms consumers. The Commonwealth obviously has a paramount interest in protecting the statewide economy and preserving the free flow of commerce within its borders. The General Assembly has pursued this interest by establishing a comprehensive legislative wage-and-hour scheme that sets a uniform, statewide minimum wage. Local governments should not be allowed to undermine the effectiveness of this scheme by adopting their own minimum wage rates.

ARGUMENT

*“How many legs does a dog have if you call the tail a leg?
Four. Calling a tail a leg doesn’t make it a leg.” –
Abraham Lincoln*

And saying that Louisville’s minimum wage increase does not interfere with the Commonwealth’s comprehensive statewide wage-and-hour legislative scheme does not make it so either. The proponents of Louisville’s minimum wage increase want to pretend that Louisville exists in a vacuum and that its minimum wage increase will not

have implications outside Louisville or disrupt the Commonwealth's comprehensive and intricate wage-and-hour scheme. But that is not the reality in which we live. The reality is that Louisville's minimum wage increase will balkanize the Commonwealth's economy and disrupt the existing statewide legislative scheme for wages and hours. There are other well-documented negative consequences flowing from minimum wage increases,¹ but this brief will not focus on those issues. Rather, this brief will highlight the reasons why the minimum wage is governed by—and should continue to be governed by—a comprehensive statewide scheme of legislation. The bottom line is that the minimum wage is not a local issue that should be addressed by local governments. It is an issue of statewide concern, and a locally enacted change in the minimum wage will have effects that reach far beyond the locality enacting the change. Thus, a single, comprehensive statewide policy is necessary, and that is exactly what the General Assembly has adopted with the Wages-and-Hours Law.

I. Kentucky has adopted a statewide comprehensive scheme of legislation on the minimum wage.

The plain language of KRS 337.275 demonstrates that Kentucky has a statewide comprehensive scheme of legislation with regard to the minimum wage:

Except as may otherwise be provided by this chapter, **every employer shall pay** to each of his employee's wages at a rate of not less than five dollars and eighty-five cents (\$5.85) an hour beginning on June 26, 2007, not less than six dollars and fifty-five cents (\$6.55) an hour beginning

¹ See, e.g., Richard A. Posner, *Economic Analysis of the Law* § 11.7 (6th ed. 2003) (noting that raising the minimum wage results in higher unemployment); Brian Strow, The Bluegrass Institute, *The Minimum Wage and its Effect on Kentucky's Economy* (2015) ("Groups most likely to be put out of work by minimum-wage increases are the very people whom the policy is supposed to help: young people and the working poor."), available at <http://www.bipps.org/wp-content/uploads/2015/02/The-Minimum-Wage-and-its-effects-on-Kentuckys-economy.pdf>; Mark Wilson, *The Negative Effects of Minimum Wage Laws*, 701 Policy Analysis (June 21, 2012) ("The main finding of economic theory and empirical research over the past 70 years is that minimum wage increases tend to reduce employment."), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA701.pdf>.

July 1, 2008, and not less than seven dollars and twenty-five cents (\$7.25) an hour beginning July 1, 2009. If the federal minimum hourly wage as prescribed by 29 U.S.C. sec. 206(a)(1) is increased in excess of the minimum hourly wage in effect under this subsection, the minimum hourly wage under this subsection shall be increased to the same amount, effective on the same date as the federal minimum hourly wage rate. **If the state minimum hourly wage is increased to the federal minimum hourly wage**, it shall include only the federal minimum hourly rate prescribed in 29 U.S.C. sec. 206(a)(1) and shall not include other wage rates or conditions, exclusions, or exceptions to the federal minimum hourly wage rate. In addition, the increase to the federal minimum hourly wage rate does not extend or modify the scope or coverage of the minimum wage rate required under this chapter.

KRS 337.275(1) (emphasis added). The statute is written with universally applicable mandatory language. And it is accompanied by 11 sister provisions in KRS Chapter 337, *see* KRS 337.285-.405, as well as several administrative regulations adopted by the Kentucky Department of Labor for the purpose of interpreting and enforcing the statute, *see* 803 KAR 1:005, *et seq.* It is difficult to imagine how Kentucky's minimum wage scheme could be any more comprehensive. Therefore, in the absence of any particular grant of authority from the General Assembly to increase the minimum wage, Louisville has no power to take such action. *See Ky. Licensed Beverage Ass'n v. Louisville-Jefferson County Metro. Gov.*, 127 S.W.3d 647, 649 (Ky. 2004).

On top of this, there is no indication anywhere in the statute that the General Assembly intended some employers—e.g., employers in Jefferson County—to be subject to different minimum wage rates. To the contrary, all indications point to the General Assembly's intent to create a comprehensive scheme. And the reason they would do so is obvious: having a uniform minimum wage rate across the Commonwealth is important to preventing the balkanization of the Commonwealth's economy and ensuring the free

flow of commerce within the Commonwealth. If Louisville could set a higher minimum wage, there is no end to the ways in which it could enact economy-balkanizing ordinances that disrupt comprehensive legislative schemes put in place by the Commonwealth. For example, it could mandate things like five-hour lunch breaks for workers and three months of paid vacation leave each year. Such mandates would be just as disruptive to the Commonwealth's comprehensive wage-and-hour legislative scheme as an increased minimum wage. Perhaps more importantly, allowing Louisville to set its own minimum wage would set a precedent that would authorize *every* single municipality in Kentucky to set its own minimum wage. There are over 400 incorporated cities in Kentucky. To simply allow the *possibility* for over 400 different minimum wages across the state would create a chaotic and uncertain economic environment that would stifle growth. And if even a fraction of those cities actually created their own minimum wages, it would create economic disruption for large and small businesses alike.

II. Local increases in the minimum wage have the effect of balkanizing the economy and restricting the free flow of commerce.

Kentucky has 120 separate counties, but it does not have 120 separate economies. Nor should it. Kentucky's counties are connected in an economic web within which occurrences in one county might cause consequences in distant counties. This Court has recognized the importance of protecting the free flow of commerce within this web. *See Ky. Milk Marketing & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 900 (Ky. 1985); *see also Motor Vehicle Comm'n v. Hertz Corp.*, 767 S.W.2d 1, 3 (Ky. App. 1989) (quoting *Ky. Milk Marketing & Antimonopoly Comm'n*, 691 S.W.2d at 900). In fact, it has found this interest to be protected by the Kentucky Constitution. *See Ky. Milk Marketing & Antimonopoly Comm'n*, 691 S.W.2d at 900.

Contrary to this constitutionally protected interest, localized increases in the minimum wage restrict the free flow of commerce. The resulting balkanizing effect of localized minimum wage rates is easy to see. It is axiomatic that differing regulatory regimes erect barriers to entry and increase the cost of doing business for firms that operate across multiple regulatory regimes. Thus, when the minimum wage differs from one county to the next, businesses that operate in multiple counties experience added costs. These added costs place businesses that operate across multiple minimum wage regimes at a comparative disadvantage to those businesses that only operate within a single minimum wage regime. The result is that Louisville's higher minimum wage will discriminate in favor of companies that only do business in Louisville and will erect a barrier of entry that will discourage businesses outside Louisville from entering the Louisville marketplace.

Consider, for example, two hypothetical businesses, one located in Louisville and one located in Shelby County. If the Louisville establishment wanted to open a store in Shelby County, it would not necessarily have to make any additional effort to ensure that it is in compliance with the wages and hours laws; it could continue paying its employees at the rate mandated by Louisville without running afoul of the applicable minimum wage in Shelby County. However, if the Shelby County business decided to open a store in Louisville, it would have to consult professionals regarding compliance with the Louisville minimum wage ordinance, and it would have to set up parallel processes for paying wages for work performed in each county. This would result in added paperwork and added administrative burdens, which would detract from productive time. Moreover, it would create significant uncertainties for the Shelby County establishment. For

example, if an employee clocks in and then is sent to deliver purchased goods to a Louisville customer—however briefly—must the employee be paid the Louisville minimum wage for the few minutes spent in Louisville? Because of these issues, it is much more burdensome and expensive for the Shelby County business to conduct business in Louisville than for the Louisville business to conduct business in Shelby County. The Louisville minimum wage thus has the effect of balkanizing the regional economy by erecting barriers to entry of the Louisville marketplace and discriminating in favor of existing Louisville businesses.²

Consumers will be among the indirect casualties of this economic balkanization caused by Louisville's increased minimum wage. Minimum wage increases generally lead to inflation. *See* Wilson, *supra* n.1. This effect will be amplified in Louisville. Because the Louisville minimum wage will create disincentives for firms outside Louisville to enter the Louisville marketplace, business competition in Louisville will be reduced. Reduced competition leads to higher prices and lower quality of goods and services. Coupled with the ordinary inflation caused by minimum wage increases, this will inevitably have very negative consequences for Louisville's consumers.

Significantly, in striking down New Orleans' minimum wage ordinance, the Louisiana Supreme Court acknowledged the disruptive effects that local minimum wages have on a state's economy. *New Orleans Campaign For a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002). The state legislature had found that:

² Of course, the analysis is slightly different for Jefferson County businesses that are near the county line. For those establishments, the long-term protectionism effect of the Louisville minimum wage ordinance may not take hold. Instead, those establishments could be placed at a comparative disadvantage due to their close proximity to competing businesses in adjacent counties that are subject to lower minimum wages. When faced with higher labor costs, businesses that are in Louisville, but near the county line, will be faced with the unenviable choice of raising their prices and watching their customers bypass them in favor of nearby businesses with lower prices across the county line, or keeping prices the same and resigning themselves to lower sales.

. . . [L]ocal variation in legally required minimum wage rates would threaten many businesses with a loss of employees to areas which require a higher minimum wage rate and many other businesses with the loss of patrons to areas which allow for a lower wage rate. The net effect of this situation would be detrimental to the business environment of the state and to the citizens, businesses, and governments of the various local jurisdictions as well as the local labor market.

Id. at 1104-05. Proponents of the local minimum wage ordinance disputed this and presented the trial court with expert evidence to the contrary. However, the Louisiana Supreme Court agreed with the state legislature. It found that “state regulation of minimum wage rates is of vital interest to the citizens of Louisiana, and that statewide regulation of minimum wage rates tends to preserve the public welfare.” *Id.* at 1107. The same is true here. The economic principles relied upon by the Louisiana Supreme Court are universal; they apply equally in Kentucky.

A decade-long study of the effect of minimum wage rates on employment in the States of Washington and Idaho also demonstrates how a locally enacted minimum wage increase can lead to disruption of the economy. *See* Debra Burke, Stephen Miller, & Joseph Long, *Minimum Wage & Unemployment Rates: A Study of Contiguous Counties*, 46 Gonz. L. Rev. 661 (2011). The study focused on contiguous counties on either side of the Washington-Idaho border. *See id.* at 678. At the beginning of the ten-year study period, both states had the same minimum wage rate, just as Louisville and the Kentucky counties that surround it had the same minimum wage prior to Louisville’s local increase. *See id.* at 678, 685. However, during the ten-year study period, Idaho’s minimum wage remained the same while Washington’s rose on multiple occasions. *See id.* at 678-79. The results of the study are hardly surprising:

The corresponding trends between minimum wage rate changes and unemployment rates on both sides of the Washington-Idaho border are large and readily observable. In 1998, when both states still had the same minimum wage rate, the border unemployment rate in Washington was 40% lower than the border unemployment rate in Idaho. By 2006, Washington's minimum wage rate was 48% higher than that of Idaho and the unemployment rate of Washington's border counties was 38% higher than that of the Idaho counties. The comparison between contiguous counties only strengthens the impact of that observation. Net unemployment in the Washington border counties increased by over 22% between 1998 and 2006; over the same period, net unemployment in Idaho border counties fell by 48%.

Id. at 680 (footnotes omitted). This study provides a glimpse of what a locally increased minimum wage will lead to in Louisville: an island of economic underperformance. The Commonwealth obviously has an interest in preventing such economic islands, and it has pursued that interest by establishing a statewide minimum wage.³

III. Kentucky's urban/rural divide amplifies the negative consequences of a local minimum wage increase in Louisville.

Kentucky has a more pronounced urban/rural divide than most states. Unlike states with many urban areas and vast suburban communities, Kentucky's few urban

³ Although not directly related to the interests of KGA, it should be noted that healthcare providers are uniquely impacted by an increase in the minimum wage by local governments. Unlike other businesses, healthcare providers who accept Medicaid cannot cope with higher labor costs by passing a portion of it on to consumers. Medicaid reimbursement rates are set by the Commonwealth, and there is no obligation to increase them when providers are subjected to a higher minimum wage. A regulation permits providers to request an increase in their reimbursement rates if they are subjected to a minimum wage increase, but the regulation only obligates the Commonwealth to *consider* the request. See 907 KAR 1:025. There is nothing in the regulation that *requires* the Commonwealth to compensate Medicaid providers at a higher rate to help offset increases to the minimum wage. See *id.* And given the fiscal challenges facing Kentucky's Medicaid program, it is unlikely that the Commonwealth would grant a request for higher reimbursement rates. Thus, Louisville's minimum wage increase will likely cause financial hardships for Medicaid providers in Louisville. This would create yet another balkanizing effect by potentially giving Medicaid recipients in Louisville less access to care than Medicaid recipients in other parts of the Commonwealth.

areas are in close proximity to areas that are decidedly rural. The rural areas are often characterized by a lower cost of living, and correspondingly lower wages. If Louisville is permitted to establish its own minimum wage at a higher rate than the rest of the Commonwealth, then workers in surrounding rural areas may abandon jobs in their home communities to seek the higher paying jobs in Louisville. The higher Louisville minimum wage will be a magnet that draws workers from surrounding rural areas. This will have a number of negative consequences.

First, because minimum wage workers in the surrounding rural areas will be drawn to the higher minimum wage in Louisville, there will be increased competition for already scarce jobs in Louisville. This will make it even harder for minimum wage earners residing in Louisville to find (or keep) a job, thus exacerbating the harm to them.

It will also harm employers in the surrounding rural areas by depriving them of their workforce. They will incur additional costs in recruiting and training new workers, and they may ultimately be forced to increase wages to match the minimum wage in Louisville in order to keep employees from fleeing to Louisville. To the extent that employers in the surrounding rural areas will ultimately have to match Louisville's minimum wage, Louisville will have effectively mandated the minimum wage for an entire region of the Commonwealth.

The fact that local minimum wage increases could allow cities like Louisville to set a de facto minimum wage for an entire region has been observed by others as well. In a recent report on local minimum wage ordinances, the National Federation of Independent Business noted that "[t]he result [of local minimum wages] is that dominant cities can effectively set the going rate for employment in different industries within the

larger region, which clearly implicates concerns in neighboring communities and for the state more generally.” National Federation of Independent Business, *How to Fight Local Balkanization of Labor & Employment Standards* (July 31, 2015), available at <http://www.nfib.com/article/how-to-fight-local-balkanization-of-labor-and-employment-standards-70289/>. This alone should be fatal to Louisville’s ordinance, and illustrates the legislative purpose behind the Wages-and-Hours Law’s comprehensive scheme. It is indisputable that Louisville lacks authority to regulate beyond its borders.

In addition to the negative consequences for rural employers, rural consumers will also suffer from Louisville’s minimum wage increase. The inflation stemming from the minimum wage increase will have disproportionate effects on them. Some goods and services can only be found in urban areas. Because wages are often lower in rural areas due to their lower costs of living, the inflationary effects of Louisville’s minimum wage increase will make goods and services more expensive for some residents of rural areas.

IV. The Appellees rely heavily on federal and out-of-state authorities, but those authorities do not address Kentucky’s statewide comprehensive scheme of legislation, nor do they address the deleterious balkanizing effect that local control would have on such a scheme.

Although federal and sister-state cases did not play much (if any) role in the Circuit Court’s decisional process, they warrant a brief mention here, if only to illustrate how little they serve to inform this Court’s analysis. The federal and state cases which have addressed local minimum wage regulation hardly suggest a consistent approach to the issue among the various courts, particularly given the significantly different home rule regimes.

However, in denying Appellants’ request for emergency relief, a Kentucky Court of Appeals Judge cited *International Franchise Association v. City of Seattle*, 97

F.Supp.3d 1256 (W.D. Wash. 2015)—a federal court decision in which the court refused to grant relief from a Seattle minimum wage ordinance—for the proposition that Appellants were not likely to prevail on the merits. Order at 12. Despite the parties’ concession that Seattle possessed authority to raise the minimum wage,⁴ the federal court nevertheless added that “[i]t is well settled that raising the minimum wage is within the city’s police power.” *Id.* at 1263 n.4, citing *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) (acknowledging that “[t]he power to regulate wages and employment conditions lies clearly within a state’s or municipality’s police power”).⁵ These citations offer no support for the issues before this Court concerning Louisville’s authority *under Kentucky law* to adopt the ordinance at issue here. Indeed, in both the Seattle and Berkeley cases, those challenging the ordinances conceded the existence of local authority to increase the minimum wage rate.

In the Seattle case, a Washington state law explicitly provides that it merely “establishes a minimum standard for wages and working conditions of all employees in this state, . . . , and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder . . . which are more favorable to employees than the minimum standards applicable under this chapter” RCW 49.46.120. Although the City has argued that KRS 337.395 has the same effect, the savings language in that provision is far different than the Washington statute.

⁴ *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 398 (9th Cir. 2015) (Those seeking relief from the Seattle ordinance “did not challenge the City’s authority to raise the minimum wage generally . . .”).

⁵ Framing this as a police powers question tends to confuse the issue and begs the question of which such powers Louisville possesses vis-à-vis the Commonwealth. Unquestionably, the Commonwealth possesses the whole range of police powers reserved to the states in our federal system. On the other hand, Kentucky local governments have no inherent power, but instead possess only those powers the Legislature has granted. Ky. Const. § 156b. The issue before this Court is whether local governments possess the power to adopt ordinances which deviate from the Commonwealth’s establishment of public policy through a comprehensive scheme of wage and hour laws.

In the Berkeley case, California law “expressly contemplated further wage regulation by individual localities” *RUI One Corp.*, 371 F.3d at 1142 (“Nothing in this part shall be deemed to restrict the exercise of local police powers in a more stringent manner.” (quoting Cal. Lab. Code § 1205(b))). Again, there is no analogous legislative expression in Kentucky law granting local governments the power to regulate wages and hours of private employers. *Compare*, KRS 344.300 (unlike KRS Chapter 337, the Kentucky Civil Rights Act expressly authorizes cities and counties the right to prohibit discrimination, and to create local human relations boards with power to enforce the local measures).

Likewise, the two competing threads of sister-state authority offer little to inform an analysis of Kentucky home rule. For example, in *New Mexicans for Free Enterprise v. City of Santa Fe*, 138 N.M. 785, 125 P.3d 1149, 1156 (N.M. App. 2005), the court let stand a Santa Fe ordinance raising the local minimum wage for employers registered or licensed with the city that employ 25 or more employees. Significantly, the court’s holding was tempered by its “serious concerns about non-uniformity” which could stem from an ordinance of wider application, such as one “attempting to set a minimum wage term for any contracts for labor ‘entered into’ within the City or for any ‘labor provided’ in the City,” as such provisions could cause “disruption of employment contract terms” under New Mexico law. *Id.* at 1163-64. *Compare*, Louisville Ordinance (purporting to apply to “[e]very Employer within the jurisdictional boundaries of Louisville Metro”).

The New Mexico court did reject the contention that the ordinance was inconsistent with the state wage and hour law, mechanically concluding that the state law merely established a “wage floor” and was otherwise silent concerning local wage

increases. *Id.* at 1165. But the court’s claim that the statute was “silent” rests upon the straw man example of a “state law ... silent on smoking on public places” which, if deemed preclusive of local health and safety regulation, would cause cities to “effectively lose much of their ability to regulate.” *Id.* At least in the context of our own comprehensive statutory and regulatory Wages and Hours Law scheme, it is disingenuous to claim that the Commonwealth’s law is “silent” on minimum wages and myriad other aspects of the employer-employee relationship.⁶ Moreover, among the “authority” the court relied upon was a *dissenting* opinion from New York’s highest court concerning a New York City ordinance attempting to raise the local minimum wage. *Id.* at 1166.⁷

In fact, the New York Court of Appeals—that state’s highest court—*affirmed* an intermediate appellate court’s holding that the local ordinance was inconsistent with state law because the ordinance “forbids hiring at a wage which the state law permits and so prohibits what the state law allows.” *Wholesale Laundry Bd. of Trade, Inc. v. City of New*

⁶ Similarly, in *City of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (Md. 1969), Maryland’s high court refused to invalidate a Baltimore city minimum wage ordinance which pre-dated the State’s minimum wage statute. The court found significant the legislature’s failure to including language repealing the city ordinance as reflective of at least tacit legislative approval of the city’s exercise of authority in that area. By contrast, the Commonwealth has exclusively exercised authority over wage and hour matters since the 1938 enactment of the Women and Minors’ Employment Act, Statutes 1938, §§ 4767a-1 – a-20, with the 2014 Louisville ordinance (and the 2015 Lexington ordinance) the only known incursions into a field otherwise exclusively occupied by the Commonwealth. Moreover, the Maryland court endorsed a theory of concurrent state and local regulation, which could only be defeated by the legislature’s “express denial of the right to act by local authority,” a far different analysis than that previously applied by this Court in *Ky. Licensed Beverage Ass’n*, 127 S.W.3d 647.

⁷ Ultimately, the New Mexico court revealed the true nature of its analysis, claiming that the “legislature remains the ultimate check on home rule” power, and adding that the “legislature clearly knows how to preempt local lawmaking when it wants to do so.” *Id.* at 1166. By demanding express preemption, in lieu of comprehensive scheme preemption, the court was effectively reversing the presumption applicable to ordinance validity. Unlike the New Mexico court, this Court has continued to analyze local ordinances in light of comprehensive scheme without additionally demanding express legislative preemption. See *Ky. Licensed Beverage Ass’n*, 127 S.W.3d 647.

York, 17 A.D.2d 327, 234 N.Y.S.2d 862, 864-65 (App. Div. 1962), *aff'd without opinion*, 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (N.Y. 1963).⁸

Simply put, there is no discernable trend among the states with respect to local minimum wage ordinances, requiring instead an analysis of their validity under pertinent Kentucky law.

CONCLUSION

Given the negative consequences associated with increases in the minimum wage, it is not surprising that the Commonwealth of Kentucky has adopted a comprehensive, statewide wage-and-hour legislative scheme. Louisville should not be allowed to interfere with this scheme by setting its own minimum wage. The decision to increase the minimum wage exclusively resides with the General Assembly.

Respectfully Submitted,



John C. Roach
Ransdell & Roach, PLLC
Building One, 176 Pasadena Drive
Lexington, Kentucky 40503
Telephone (859) 276-6262

⁸ The following year, despite a state constitutional amendment broadening local home rule powers, the New York courts once again found that New York City's 1964 re-enactment of that ordinance was still inconsistent with the state's general law on the same subject, and thus void. *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 43 Misc.2d 816, 252 N.Y.S.2d 502, 506 (N.Y. Sup. 1964), *aff'd without opinion*, 22 A.D.2d 762 (App. Div. 1964), *aff'd without opinion*, 15 N.Y.2d 604, 255 N.Y.S.2d 265, 203 N.E.2d 652 (N.Y. 1964).